INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	5
Argument	6
Conclusion	21

CITATIONS

Cases:

Aetna Insurance Co. v. *Hannibal & St. J. R. Co.*, 1 Fed. Cas. No. 96	16
American Surety Co. v. *Electric Co.*, 296 U. S. 133	17
Augusta Broadcasting Co. v. *United States*, 170 F. 2d 199	18
Baird v. *United States*, 96 U. S. 430	17
Baltimore S.S. Co. v. *Phillips*, 274 U. S. 316	17
Chicago, etc. R. R. Co. v. *Pullman Car Co.*, 139 U. S. 79	16
Crab Orchard Improvement Co. v. *C. & O. Ry. Co.*, 115 F. 2d 277	15
Dayton Veneer & Lumber Mills v. *Cincinnati, N. O. & T. P. Ry. Co.*, 1 F.R.D. 444	18
Employers' Fire Ins. Co. v. *United States*, 167 F. 2d 655	10
Firemen's Ins. Co. v. *Bremner*, 25 F. 2d 75	16
First Nat. Bank of Ottawa v. *Lloyd's of London*, 116 F. 2d 221	19
Flynn v. *Brooks*, 105 F. 2d 766	13
Hall & Long v. *Railroad Companies*, 13 Wall. 367	16
Hobbs v. *McLean*, 117 U. S. 567	10
Hoe v. *Wilson*, 9 Wall. 501	14
Howes & Co. v. *United States*, 24 C. Cls. 170	7
Kerna v. *Trucking, Inc.*, 3 F.R.D. 365	19
Lloyd Moore, Inc. v. *Schwartz*, 26 F. Supp. 188	18
Mercer Casualty Co. v. *Perlman*, 62 Ohio App. 133	15
National Mutual Ins. Co. v. *Tidewater Trf. Co.*, 337 U. S. —	20
Norwich Union Fire Ins. Soc. v. *Standard Oil Co.*, 59 Fed. 984	16
Over v. *Lake Erie & W. R. Co.*, 63 Fed. 34	16
Par-X Uniform Service Corp. v. *Emigrant Indus. Sav. Bank*, 268 App. Div. 699	18
Price & Pierce v. *Jarka Great Lakes Corp.*, 37 F. Supp. 939	19

Cases—Continued

	Page
Shields v. *Barrow*, 17 How. 130	13
Southern Bell Telephone & Telegraph Co. v. *Watts*, 66 Fed. 460	16
Standard Marine Ins. Co. v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284	15
Sullivan v. *Naiman*, 130 N.J.L. 278	19
Suttles v. *Railway Mail Ass'n*, 156 App. Div. 435	15
United States v. *Aetna Casualty & Surety Co.*, No. 35, this Term	2, 3, 6
United States v. *American Tobacco Co.*, 166 U. S. 468, affirming 32 C. Cls. 207	10, 16, 17, 19
United States v. *Gillis*, 95 U. S. 407	9
United States v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404	9, 10, 20
United States v. *Sherwood*, 312 U. S. 584	20
Western Fire Ins. Co. of Fort Scott, Kan. v. *Word*, 131 F. 2d 541	19
Williams v. *Powers*, 2 F.R.D. 362	10
Yale Transport Corp. v. *Yellow Truck & Coach Mfg. Co.*, 3 F.R.D. 440	19

Statutes:

Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess., Section 2(b)	3
Act of April 25, 1949, c. 92, P. L. 55, 81st Cong.	4, 5
Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, formerly 28 U. S. C. 931 *et seq.*	3
Sec. 420	4
R.S. 3477, 31 U.S.C. 203	4, 6, 7, 14, 19
28 U.S.C., as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.:	
Sec. 1346 (c)	12
Sec. 2401 (b)	4, 5
31 U.S.C. 71	7, 12
31 U.S.C. 227	7, 11, 12

Miscellaneous:

8 Couch on *Insurance*, Sections 1997, 2019	17
Federal Rules of Civil Procedure:	
Rule 17(a)	5, 6, 7, 11, 18, 19
Rule 19(b)	12
Rule 24	10
2 Moore, *Federal Practice* (1938) Section 17.08	14
3 Moore, *Federal Practice* (2d ed., 1948) Sections 17.09, 19.07	13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1949

37

UNITED STATES OF AMERICA, PETITIONER

v.

YORKSHIRE INSURANCE COMPANY

No. 38

UNITED STATES OF AMERICA, PETITIONER

v.

THE HOME INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the District of New Jersey did not write an opinion. The opinion of the United States Court of Appeals for the Third Circuit (R. 7-11, 15) is reported at 171 F. 2d 374.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 5, 1948 (R. 11, 12). A petition for rehearing, seasonably filed, was denied on December 6, 1948 (R. 15). The petition for certiorari was filed March 2, 1949, and was granted on April 25, 1949 (R. 16). The jurisdiction of this Court rests upon 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the prohibition by R. S. 3477 (31 U.S.C. 203) of the assignment of claims against the United States may be invoked by the Government to bar recovery of judgments against it under the Federal Tort Claims Act by two insurance carriers, each claiming by subrogation the right to prosecute to separate judgment in its own name, as the "real party in interest," a portion of the single claim of the insured original claimant against the United States.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act and of the statutes forbidding assignment of claims against the Government and providing for the counterclaim and offset against claims and judgments against the United States of the Government's cross claims against the plaintiff, are set forth in Appendix A to the brief for the United States in *United States* v. *Aetna Casu-*

alty and Surety Company, No. 35, this Term, and will not be repeated here.[1]

STATEMENT

A building in Asbury Park, New Jersey, under lease to the United States, was damaged by fire on February 18, 1945 (R. 2, 3). On July 11, 1947, respondent Yorkshire Insurance Company filed an action against the United States under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, in the United States District Court for the District of New Jersey, alleging that the damage to the property had resulted from the negligent refueling of an oil burner with gasoline by an enlisted man of the United States Navy acting within the scope of his employment, and that as the result of such negligence it was obliged to pay and did pay its assured the owner, Emma R. Stuart, the sum of $3,842.06 (R. 1-2). A similar action was filed in the same court on the same day by respondent Home Insurance Company, which alleged that it had been obliged to pay to its as-

[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied in the Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations herein are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Tort Claims Act.

sured, Emma R. Stuart, the sum of $4,354.34 (R. 2-3). Each complaint sought judgment against the United States in the amount of $5,000 and costs (R. 2, 3). Neither complaint contained any allegation as to the total amount of the damage caused by the fire nor as to the extent to which the original claimant or other persons are still interested in the claim.

The United States moved to dismiss each complaint on the ground that the Tort Claims Act does not permit suits on derivative claims and that the actions were barred by R.S. 3477, 31 U.S.C. 203 (R. 3-6). The district court heard these motions together with motions by respondents to substitute the original claimant as a new party plaintiff and entered an order dismissing the complaint in each case on the ground that the Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant" and denying the substitution of the original claimant as time barred (R. 6).[2]

Each respondent appealed, and the appeals were briefed and argued together (R. 8). The United States Court of Appeals for the Third Circuit sustained the right of insurance company subrogees to sue under the Tort Claims Act, holding that the equitable rights of an insurance company in any

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[2] By the terms of the original limitation provision of the Tort Claims Act (sec. 420, 60 Stat. 845) suit on causes of action arising prior to its enactment on August 2, 1946, were required to be brought within one year of its enactment. Amendment of 28 U.S.C. 2401(b) by the Act of April 25, 1949 (P. L. 55, 81st Cong.) has since extended the limitation period until April 25, 1950.

recovery by the assured qualified it as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, and that the property owner and other insurers, if any, while necessary parties, are not indispensable parties (R. 7-11).[3] It therefore reversed and remanded for further proceedings in the district court, stating that "if the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have their chance to prove their case on the merits" (R. 11).[4]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that both the original claimant and each subrogated insurance carrier "own" portions of the substantive right of the original claimant against the United States as tort-feasor.

2. In holding that a partial subrogee was entitled to recover judgment against the United States in

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[3] Because the emphasis on oral argument was placed on these procedural aspects of these appeals, rather than the purely substantive arguments advanced in the district court and repeated in the Government's brief, the Court of Appeals, being of the opinion that the substantive arguments were not well taken, erroneously assumed that the Government was conceding the error of its substantive arguments (R. 8). A statement to this effect was originally included in the opinion, but was removed by amendment after the Government re-emphasized its position in a petition for rehearing (R. 15).

[4] Neither the action of the court below nor a reversal thereof by this Court can ultimately defeat the substantive rights of respondents. The Act of April 25, 1949, c. 92 (P. L. 55, 81st Cong.) has amended the limitation provision of 28 U.S.C. 2401(b) so that the original claimant may be joined as an additional plaintiff or a new suit brought in her name for the use of respondents.

its own name as the "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure.

3. In holding that the property owner and other insurers, if any, are not indispensable parties to an action brought by an insurance company on its equitable rights as partial subrogee of a claim for property damage.

4. In reversing the judgments of the district court.

ARGUMENT

The brief for the United States in the companion case of *United States* v. *Aetna Casualty and Surety Company*, No. 35, this Term, fully develops the reasons and authorities which establish the right of the United States to invoke R.S. 3477, 31 U.S.C. 203, as a bar to recovery of a judgment in its own name by a subrogated insurance carrier suing under the Tort Claims Act. Here it will be sufficient to summarize the contentions of the United States and to deal briefly with certain special contentions upon which the court below founded its decision of this case.

1. In sum, the Government contends that R.S. 3477 applies to equitable assignments by subrogation of claims under the Tort Claims Act just as fully as to any other transfer of a claim against the United States. An equitable assignment by subrogation falls within both the express language and the protective purposes of the statute. R.S. 3477 forbids every transfer or assignment, whether

equitable or express, of any claim against the United States which may in any way embarrass the United States in the settlement or compromise of the claim with the original claimant, or in any way interfere with the examination, allowance and payment of the claim by the proper officers of the Government, or with any action which such officers may legally take under statutes such as 31 U. S. C. 71 and 227, relating to the settlement and payment of claims against the United States. Such subrogees and other assignees can proceed only in the right and name of their transferors. As the Court of Claims stated in *Howes & Co.* v. *United States*, 24 C. Cls. 170, 184, "if attachments, subrogations, and assignments * * * should be upheld, the Government would not only be deprived of the right to settle with those claimants to whom it was originally indebted" but might also be involved in controversies between the subrogees or other assignees concerned in such transfers. If exempted from the application of R.S. 3477, such an equitable assignment by subrogation will destroy important statutory rights of the United States in respect of venue, counterclaim and offset just as effectively as could any written assignment.

Recognition of such equitable assignments will equally destroy the over-all scheme of simplicity and expedition in the handling of claims provided by the policy of R.S. 3477 which requires all claims, including those reduced to judgment, to be presented in the name of the original claimant. Indeed, they

result in harassment and uncertainty far exceeding that to which the United States is exposed by written assignments, which are admittedly within R.S. 3477. This is so because, unlike a written assignment, subrogation is secret and undisclosed in character, resulting from the legal consequences of acts and transactions between the original claimant and third parties concerning which the United States often has no notice and, even when informed, still lacks the detailed knowledge required for a correct appraisal. Far more than do express written assignments, equitable assignments by subrogation create uncertainties with possibility of double payment, and of multiple suits on the same claim; it greatly enlarges the possible choice of venue for suit and operates in many ways to the disadvantage of the United States. Allowing equitable assignees by subrogation to sue and recover in their own names may also require the United States to litigate complicated issues, between competing insurers and between insurers and the insured original claimant, not related in any way to the relatively simple issue of the Government's original liability to the original claimant for tort. There is thus even greater reason to apply R.S. 3477 to subrogation than to ordinary assignments.

Since an equitable assignment by subrogation of a tort claim is within the terms and purpose of R.S. 3477, it cannot be brought within any of the narrowly defined classes of transfers judicially

exempted from the all-inclusive terms of the Act, so as to permit the transferee to proceed to judgment in his own name. It is neither a universal succession to all property of the original claimant nor the transfer of an allowed claim after exercise by the United States of its rights of counterclaim and offset. Nor does the Tort Claims Act itself exempt equitable assignments by subrogation of claims arising under it. That Act does not in terms repeal the earlier statute, and any implied repeal is rebutted by the express reservation in the Tort Claims Act of the rights of the United States to counterclaim and to offset against payment of judgments which are protected by R.S. 3477.

The legislation culminating in the Tucker Act made the United States liable to suit on contract claims, but did not repeal R.S. 3477. *United States* v. *Gillis,* 95 U. S. 407, 414-416. The similar application of R.S. 3477 to tort claims in no way diminishes the liability of the United States under the Tort Claims Act nor does it in any way impair or prejudice the rights of insurance carriers to be reimbursed for their payments out of the judgment recovered by the original claimant. *United States* v. *Hill,* 174 F. 2d 61, modifying 171 F. 2d 404 (C.A. 5).

R.S. 3477 does not prevent the carrier from recovering any sums which it has paid to the original claimant whom it insured on account of damage for which the United States is liable under the Tort Claims Act as if it were a private person.

On the contrary, the application of R.S. 3477 simply requires the insurance carriers to recover in the name of their assured. Cf. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474, affirming 32 C. Cls. 207, 223-226. Its sole purpose and effect is to preserve the Government's rights in respect of venue, counterclaim and offset, and to keep the Government out of disputes with third persons. And if action is brought by the insured original claimant in his name alone, without indicating the interest which his insurers have in the recovery, the insurers need not bring a separate suit. By intervening as parties plaintiff under Civil Rule 24, they can protect their equitable interest by obtaining an express declaration in the judgment of their right to payment out of its proceeds. Compare *United States* v. *Hill, supra,* with *Employers' Fire Ins. Co.* v. *United States,* 167 F. 2d 655 (C.A. 9); and see *Williams* v. *Powers,* 2 F.R.D. 362 (N.D. Ohio).

This method of recovery is one which the insurance carriers can and constantly do practice. Their substantive rights are fully protected in this established method of recovery, while the United States obtains a valid discharge of its liability. The Government's argument applies with particular force to the case at bar. One of the important purposes of R.S. 3477 is to prevent splitting of claims and consequent multiple suits and judgments. *Hobbs* v. *McLean,* 117 U. S. 567, 576. In the present case, a single original claim has been split into three

claims: (1) that of a partial insurer; (2) that of second partial insurer; and (3) that of the owner of the damaged property for the uninsured portion of the property's value. Finally, a judgment in favor of the carriers will cut off any offset which the Comptroller General would otherwise assert, pursuant to 31 U. S. C. 227, against a judgment in favor of the original claimant. (See letter of the Comptroller General, Appendix B, pp. 70-74, of the Government's brief in No. 35.)

2. The court below in denying the application of R. S. 3477, took the view that the matter was only a procedural problem and attempted instead to deal with it as a mere case of multiple suits which could be resolved through the application of the Federal Rules of Civil Procedure relating to parties. It held that since a partial insurer is a real party in interest, entitled under Rule 17(a) to sue in its own name, the Government could be protected against splitting of the cause of action by moving to join all other insurers and the original claimant as necessary parties to the action. But the first objection to this disposition of the case is that (as pointed out by the Government's brief in No. 35) R. S. 3477 has not been repealed by the Rules of Civil Procedure any more than by the Tort Claims Act, even though the rules may be thought to provide an alternative method, where partial subrogees are involved, of reaching the same result as does the act of Congress.

In fact, however, the Civil Rules do not provide protection to the United States equal to that of R. S. 3477. The doctrines of real party in interest and necessary, but not indispensable, parties do not preserve the basic rights of the United States concerning venue and counterclaim and to have judgment entered in the name of its original claimant so as to obtain for the United States a valid discharge by payment and to enable it to exercise its rights of offset. On the contrary, the court's application of the real party in interest rule deprives the United States of the benefit of the full protection provided by those statutes because it operates to substitute the carrier for the insured original claimant as the actual plaintiff of the suit and judgment to whom alone the protective statutes apply. See 28 U.S.C. 1346(c), 31 U.S.C. 71 and 227.

Indeed, the rule of real party in interest does not even prevent the possibility of several suits on the same claim. According to the court below, the other parties having an interest in the divided claim being "necessary" but not "indispensable" parties, if suit is brought by any one of the parties having an interest in the divided claim and the others are beyond the jurisdiction of the particular district court or cannot for any reason be made parties to the suit, the court may still proceed under Rule 19(b) to frame a limited judgment in the name of the present insurer-plaintiffs on their part of the original claim. As a result, the United States could

be required not only to litigate the same issues arising out of the same transaction in more than one suit but in addition to litigate possible new issues as to the rights of the various parties to share in the proceeds of the original claim. And in such subsequent suits, neither the question of the existence and extent of the subrogation nor that of liability would be *res judicata* as to the new parties. It is thus entirely foreseeable that the United States might be held liable twice for the full amount of the original claim—first to a plaintiff held to be a subrogated insurer, then, in the later action, to a plaintiff held to be an original claimant who had not subrogated his insurer.

We believe that in fact, however, the court below erred and that the insured original claimant is the most indispensable of parties, since without her presence no binding adjudication as to the existence and extent of the subrogation can be obtained and payment of the insurer's judgment may not give the United States a valid discharge even *pro tanto*. These circumstances, we believe, meet all traditional tests as to indispensability. *Shields* v. *Barrow*, 17 How. 130. See 3 Moore, *Federal Practice* (2d ed., 1948) § 19.07. Indeed, in *Flynn* v. *Brooks*, 105 F. 2d 766, 767 (C.A. D.C.), it was held that the validity of an assignment could not be adjudicated without the presence of both assignor and assignee and that although the point had not been raised in the district court the court of appeals could take notice of the defect and remand in

order to require the joining of the absent party or the dismissal of the suit. Cf. *Hoe* v. *Wilson*, 9 Wall. 501. Since no reason exists to distinguish the present case of equitable assignment by subrogation nor to differentiate between the absence of the assignor or subrogor instead of the assignee or subrogee, we believe that the view taken of the present cases by the court below required it to follow the same course here.

The court below, in apparent reliance on the discussion found in 2 Moore, *Federal Practice* (1938) § 17.08 (see also 3 Moore, *Federal Practice* (2d ed., 1948) § 17.09), assumed the fact that the treatment of a subrogee insurer might be assimilated to that of a partial assignee fully disposed of the Government's contentions. Disregarding that the partial assignee admittedly is forbidden by R. S. 3477 to sue and recover judgment against the United States in his own name and that the court's analogy ought, therefore, to require that suit by a subrogee be barred, we submit in all deference that both the court below and the learned commentator on the Civil Rules have ignored the complications and difficulties of the right of subrogation as it is actually met in practice, and have considered a case that is presented only where an express written assignment is involved. After all, few questions are more thorny and productive of complicated litigation than the existence and extent of a right of subrogation in favor of an

insurer.[5] It is for this reason that it is the almost invariable practice of insurance and surety companies to make no payment without taking the assured's assignment. (See *e.g.*, No. 36, R. 12, 16.) And with reason, for only pursuant to the original claimant's express assignment (admittedly invalid under R. S. 3477 where the United States is concerned) can the tortfeasor ultimately liable pay the putative subrogee with any confidence that the payment will result in a valid discharge of his debt to the original claimant. Moreover, claims in tort for personal injury or property damage are always unliquidated, and the United States can be sure that it has fully discharged its liability only if it is not prevented from effecting direct settlement with the claimant or from obtaining an adjudication of the claim in an action to which the original claimant is a party. The assured and the insurer generally differ widely in their views as to what amount constitutes full indemnification, and the sum ultimately accepted by the assured in settlement of his claim against the insurer under the

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[5] The question of whether in fact the insurance company is subrogated is a prolific source of complicated litigation. See *e.g.*, *Crab Orchard Improvement Co.* v. *C. & O. Ry. Co.*, 115 F. 2d 277 (C.A. 4); *Mercer Casualty Co.* v. *Perlman*, 62 Ohio App. 133, 23 N.E. 2d 502; *Standard Marine Ins. Co.* v. *Scottish Metropolitan Assurance Co.*, 283 U. S. 284. As observed in *Suttles* v. *Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y.S. 1024, "The theory and basis of the right of the insurer to subrogation is that the insured has a claim against a third person, which he could enforce for the loss insured against. But * * * it does not follow in all cases where there has been a loss that the insurer is entitled to be subrogated to every means available to the insured for recouping his loss."

policy is usually a compromise figure which is substantially less than the claimant would expect to recover in an action against the person responsible for the damage. Payment of this amount to the insurer, whether administratively or pursuant to a judgment, will not necessarily discharge the United States nor free it from further controversy with its original claimant.

But the original claimant is an indispensable party for yet another reason. It was well settled in the federal courts long prior to the adoption of the Rules of Civil Procedure that where insured property had been destroyed by a wrongdoer and the insurance company had paid the owner less than the full value of the property the right of action against the tortfeasor remained in the property owner for the entire loss. *Chicago, Etc. Railroad Co.* v. *Pullman Car Co.*, 139 U. S. 79, 87-89; *Hall & Long* v. *Railroad Companies*, 13 Wall. 367, 370, 373; *Firemen's Ins. Co.* v. *Bremner*, 25 F. 2d 75 (C.A. 8); *Southern Bell Telephone & Telegraph Co.* v. *Watts*, 66 Fed. 460, 464 (C.A. 4); *Norwich Union Fire Ins. Soc.* v. *Standard Oil Co.*, 59 Fed. 984, 987 (C. A. 8); *Aetna Ins. Co.* v. *Hannibal & St. J. R. Co.*, 1 Fed. Cas. No. 96, at p. 208. See *Over* v. *Lake Erie & W. R. Co.*, 63 Fed. 34 (C. C. D. Ind.). While these decisions were based largely on the common law rule that the legal title to a right of action in tort always remained in the person injured and consequently the right could be asserted only in his name (*United*

States v. *American Tobacco Co.*, 166 U. S. 468, 477), the result is equally sustainable under the general rule that an insurer is not entitled to the rights of equitable subrogation unless the full amount of the insured's loss has been paid. *American Surety Co.* v. *Electric Co.*, 296 U. S. 133, 137; 8 Couch on *Insurance*, secs. 1997, 2019. The insurer is entitled to nothing until the injured party has been fully indemnified, so that by their very nature the rights of the subrogee are subordinate. On the other hand, to hold, as has the court below, that a partial subrogee is entitled to sue and recover in its own name without joining the original claimant as an indispensable party makes it co-equal with the subrogor, with the same right which he has to proceed independently against the tort-feasor. This will not only serve to embarrass the subrogor in his efforts to recover from the tort-feasor, but authorizes the harassment of the tort-feasor by multiple suits. The rule against such splitting of causes of action is fundamental in federal law. *Baird* v. *United States*, 96 U. S. 430; *Baltimore S. S. Co.*, v. *Phillips*, 274 U. S. 316, 321. The injured party has legal title to the entire cause of action and the prosecution of the action by him alone will save the United States from further harassment and vexation at the hands of other claimants to the same demand.

We believe that the court below erred and that, where an insurance carrier can claim only a partial subrogation, the correct and only workable rule

is that the person originally sustaining the loss is the "real party in interest" under Rule 17(a). *Dayton Veneer & Lumber Mills* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 1 F.R.D. 444 (E.D. Tenn.). See *Lloyd Moore, Inc.* v. *Schwartz*, 26 F. Supp. 188 (E.D. Pa., 1938). Cf. *Par-X Uniform Service Corp.* v. *Emigrant Indus. Sav. Bank*, 268 App. Div. 699, 53 N.Y.S. 2d 16. The original claimant is the legal owner of the entire claim, holding part of it in trust for the reimbursement of the insurers and therefore entitled to sue in their behalf as well as his own.[6]

The courts which have held that a partial subrogee is a real party in interest, and hence may maintain an action in its own name against the tortfeasor, have based their ruling on the fact that the subrogee was entitled to share in the recovery ultimately effected. But if this were the test, the insurance company would be a real party in interest in every case where it was entitled to share in any recovery from the tortfeasor, and yet the courts have uniformly held that where the insurance company "lends" money to its insured on a "loan receipt," the money to be repaid only out of any recovery from the alleged tortfeasor, the insured is the real party in interest entitled to sue and recover as to the entire claim. *Augusta Broadcasting Co.* v. *United States*, 170 F. 2d 199

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[6] This is true *a fortiori* where R. S. 3477 is involved, for the statute makes the original claimant "a party authorized by statute" within the meaning of Civil Rule 17(a).

(C. A. 5); *First Nat. Bank of Ottawa* v. *Lloyd's of London*, 116 F. 2d 221, 225 (C. A. 7); *Price & Pierce* v. *Jarka Great Lakes Corp.*, 37 F. Supp. 939, 943-944 (W. D. Mich.); *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.*, 3 F. R. D. 440 (S. D. N. Y.); *Kerna* v. *Trucking Inc.*, 3 F. R. D. 365 (W. D. Pa.). See *Western Fire Ins. Co. of Fort Scott, Kan.* v. *Word*, 131 F. 2d 541, 543 (C. A. 5). Yet the equity of the insurance carrier is the same, whether it makes an outright payment under the policy or takes a "loan receipt." In either case it is entitled to share in the recovery from the tortfeasor and will never be indemnified unless there is such a recovery. Cf. *Sullivan* v. *Naiman*, 130 N. J. L. 278, 32 A. 2d 589. The effect of the lower court's view is that Rule 17(a) operates as a statute of uses which converts the equitable interest of a partial subrogee to a *pro tanto* legal interest, giving it the right to maintain an action in its own name. That it does not so operate on the equitable interest of an insurer which takes a loan receipt demonstrates, we submit, that the cases which support the contrary contention are unsound in principle.

By contrast to these difficulties engendered by the solution of the court below, the application of R. S. 3477 permits only one suit in the name of the original claimant (cf. *United States* v. *American Tobacco Co.*, 166 U. S. 468, 474); only one judgment in the name of the original claimant, subject to such charges upon that judgment in favor of

attorneys, subrogees, and others as their interests may appear (see *United States* v. *Hill*, 174 F. 2d 61, modifying 171 F. 2d 404 (C. A. 5)) and only one payment which will both give the United States its valid discharge by satisfaction of the judgment and its right to offset its claims against the original claimant. (See letter of the Comptroller General, Appendix B, pp. 70-74, of the Government's brief in No. 35). Such a judgment was entered in the *Hill* case and, we submit, meets all the issues present in the adjudication of tort claims against the United States without prejudice or inconvenience to any party.[7]

We therefore re-invoke the application of R. S. 3477, but submit that in any view of the case the court below erred in reversing the judgment of the district court which had dismissed the complaint on the ground that respondents, as derivative claimants to parts of their assured's claim against the United States, could not maintain these actions in their own names. In view of the extension of

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[7] We disregard as without particular significance for the United States, the question of the jurisdiction of the district court when sitting as a court of claims to decide questions of derivative claims. While raised by the United States in the district court (R. 3-6), the question is one affecting primarily the power of the court to adjudicate rights between different insurers and their assured as to the existence and extent of subrogation. Whether the matter is so far ancillary that diversity of citizenship is not required, and whether the subject matter is so far equitable that a jury cannot be demanded, are questions to be settled in litigation between the interested parties. But compare *United States* v. *Sherwood*, 312 U. S. 584, 591, with *National Mutual Ins. Co.* v. *Tidewater Trf. Co.*, 337 U. S.

the limitation period until April 25, 1949 (see *supra*, p. 5, fn. 4), we believe the district court should now order the actions consolidated and grant respondents' motions to substitute the original claimant as plaintiff.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed, and the cause remanded to the district court with instructions to consolidate the actions and order the original claimant substituted as plaintiff in the action.

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